

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

**IN RE: PHARMACEUTICAL INDUSTRY AVERAGE
WHOLESALE PRICE LITIGATION**

MDL No. 1456

C.A. No. 01-12257-PBS

THIS DOCUMENT RELATES TO:

*International Union of Operating Engineers, Local No.
68 Welfare Fund v. AstraZeneca Pharmaceuticals, L.P.
et al.; C.A. No. 04-11503-PBS*

Judge Patti B. Saris

**MOTION BY PLAINTIFF, INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL NO. 68 WELFARE FUND,
FOR IMMEDIATE DISPOSITION ON AND GRANTING OF
PLAINTIFF'S MOTION FOR REMAND
BASED UPON DEFENDANTS' FAILURE TO FILE
SUPPLEMENTAL BRIEFING**

International Union of Operating Engineers, Local No. 68 Welfare Fund (hereinafter "Plaintiff" or "Local 68") hereby moves this Court for immediate disposition on and granting of Plaintiff's Motion for Remand based upon the defendants' failure to file supplemental briefing on the issue of removal and remand, as they were directed to do by this Court.

Plaintiff appeared before this Honorable Court on April 8, 2005 in connection with its Motion for Remand, which had been filed originally on July 9, 2003.¹ Briefing on the Motion for Remand had been concluded by the end of 2003 in filings before the United States District Court for the District of New Jersey. Because the Judicial Panel on Multidistrict Litigation transferred this matter,

¹ This Court will recall that counsel for Plaintiff previously appeared at a Court-ordered hearing on February 10, 2005 and requested that the matter of the remand either be decided by the Court, or be set for argument in the immediate future. *See* excerpts of Transcript of Hearing dated February 10, 2005, attached hereto as Exhibit "A". In response to comments by the Court to the effect that if "[y]ou want a hearing...[just] call," the undersigned reasonably believed that the hearing set for April 8, 2005 was in fact the remand hearing. *Id.* at p. 91.

the New Jersey district court never ruled upon the motion; instead it chose to defer the matter to this Court for disposition. At the April 8 hearing, this Court determined that the briefing on the remand issue was stale and directed that Plaintiff file a supplemental brief on the remand issue within two weeks of the hearing, *i.e.*, by April 22, 2005 and that defendants file their opposition brief within two weeks thereafter, *i.e.*, by May 6, 2005

On April 22, 2005 Plaintiff attempted to file its Supplemental Brief in Support of Motion for Remand and served same upon all parties via Verilaw. On May 6, 2005, the undersigned received a Notice of Rejection of Filing of the supplemental brief, dated May 3, 2005, indicating that, based upon the procedural order requiring electronic filing in all cases as of April 1, 2005, the Supplemental Brief was being rejected for filing. Because Plaintiff was required by the Notice to refile the Supplemental Brief within three business days and because the undersigned was advised that it would take two weeks to sign up for electronic filing, Plaintiff filed a Motion for Waiver of Electronic Filing on May 9, 2005. This Court granted the Motion for Waiver of Electronic Filing on May 24, 2005. In response, on June 2, 2005, Plaintiff refiled its Supplemental Brief in Support of Motion for Remand and again served same via Verilaw on all parties. The Supplemental Brief was accepted for filing as reflected by the docket entries.

Despite being served with Plaintiff's Supplemental Brief on April 22, 2005, when Plaintiff initially attempted to file it, and despite receiving it again on June 2, 2005, when it was accepted for filing, defendants have yet to file a responsive supplemental brief. Defendants should have filed their responsive brief two weeks after initially being served, *i.e.*, by May 6, 2005, as anticipated by this Court. At the very least, Defendants should have filed their responsive brief by June 16, 2005, two

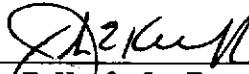
weeks after Plaintiff's Supplemental Brief was accepted for filing. Nevertheless, Defendants have yet to file any responsive supplemental brief, in violation of this Court's directive

WHEREFORE, Plaintiff respectfully requests that this Honorable Court rule upon Plaintiff's Motion for Remand, without awaiting a responsive supplemental brief from the defendants, and grant Plaintiff's Motion for Remand, sending this case, which has been awaiting a ruling on remand for almost two years, back to the Superior Court of New Jersey, Monmouth County, where it belongs.

Respectfully submitted,

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EXHIBIT “A”

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

IN RE:) MDL No. 1456 and
AVERAGE WHOLESALE PRICE) C.A. No 01-12257-PBS
PHARMACEUTICAL LITIGATION) Courtroom No. 19
) 1 Courthouse Way
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FEBRUARY 10, 2005

2:10 P.M.

BEFORE THE HONORABLE PATTI B. SARIS
UNITED STATES DISTRICT JUDGE

Valerie A. O'Hara
Official Court Reporter

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1 proceed. Another issue might be whether the state's case,
2 having been brought in 2005, and perhaps not having, you
3 know, the ability to go back in time is barred by the
4 statute of limitations or the claims period is now over,
5 another problem; whether the drugs are the same or
6 different.

7 THE COURT: I say those are terrific points. I
8 think I can defer thinking about it, and it may be that it's
9 actually a good sort of warning in the sense that the state
10 cases to the extent that you're really eager to pursue them
11 by the time this goes up to the First Circuit and back,
12 they're either rulings or not, they are rulings of the
13 court.

14 Get the issues teed up in whatever state you have
15 the authorities. That's a really good checklist of things I
16 might have to worry about.

17 MR. SOBOL: That's all, just again, talking about
18 the kind of things we've been concerned about on our side,
19 what we'd be happy to do, what you suggested, and, in fact,
20 we told them we anticipated that would be your approach
21 regardless whether you ordered it or not, frankly. If we
22 came in here with a settlement, some AG came in and said we
23 weren't notified, you'd be pretty upset with us.

24 THE COURT: Okay. Great. Now, let me just hear
25 from Mr. Sullivan.

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1 MR. SULLIVAN: Thank you, your Honor. Thank you
2 for this indulgence. Just so it's clear, I'm here today to
3 speak on behalf of the International Union of Operating
4 Engineers, Local 68 Welfare Fund. It's an organization out
5 of the State of New Jersey.

6 By way of very brief background, I know the day is
7 getting long, we filed an action on behalf of the
8 International Union, Local 68, on June 30th, 2003, Chancery
9 Division, Mt. Mechanics Superior Court, New Jersey. At the
10 same time, we also filed a motion to show cause with
11 restraints asking for certain types of injunctive relief on
12 behalf of the union and the people of the class the union
13 wishes to represent.

14 The class itself is a state action for state
15 limited claim. We are only seeking to represent those
16 persons in New Jersey. We've not filed a national class
17 action, we've not filed a multiple state class action, we've
18 not sought to invoke federal statutes, such as ERISA or
19 Medicare, we've not pled --

20 THE COURT: You want to remand?

21 MR. SULLIVAN: It's a lead-in, it's a lead-in to
22 where we part some of our issues, and we're not seeking to
23 represent any Government entities that again would have
24 federal issues come up.

25 THE COURT: You've been transferred here?

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1 MR. SULLIVAN: Yes.

2 THE COURT: I wasn't prepared. Your case was part
3 of the MDL, it was transferred here, and now you don't want
4 to be here, so you want to go home?

5 MR. SULLIVAN: We want to go home.

6 THE COURT: Have you filed a motion to go home?

7 MR. SULLIVAN: We've been waiting for a hearing,
8 your Honor, on the motion to remand. A little bit of the
9 procedural background --

10 THE COURT: You want a hearing?

11 MR. SULLIVAN: We've been waiting for a hearing.

12 THE COURT: You know, would you call here.

13 There's so much going on here, if you filed a motion and you
14 need a hearing, and you thought we've dropped you through
15 the cracks, call. I think we actually anticipated because I
16 had my clerk do an inventory of everything that was pending.
17 April 8th.

18 MR. SULLIVAN: Thank you, your Honor.

19 THE COURT: Okay. It's nicer then.

20 MR. SULLIVAN: The reason why we want to go back
21 to New Jersey is part of our relief is we've been requesting
22 and we still want to request injunctive relief against the
23 defendants we've sued. That's not part of the lawsuit or
24 the MDL matter that's before your Honor today. We believe
25 that that is very important relief that can be recovered

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1 under the New Jersey Consumer Fraud Act, and it's very
2 valuable relief to our clients because not only are we
3 seeking monetary damages for the present, but we are seeking
4 injunctive relief so that we don't have to come back in the
5 future.

6 THE COURT: Let me ask you, if this new
7 legislation passes, does it affect you?

8 MR. SULLIVAN: I think we'll have to wait to see
9 how well the certain other groups of individuals, such as
10 the Democrats are able to change the legislation. In the
11 short, I don't know, your Honor, whether or not --

12 THE COURT: I'm just wondering, I'm reading every
13 day about it. I can't quite tell.

14 MR. SULLIVAN: I'm hoping it doesn't. Obviously,
15 it depends which versions go through. Prior versions would
16 take just about every class action out of state court and
17 move it into federal court.

18 THE COURT: It may be moot, it may be not?

19 MR. SULLIVAN: Yes, maybe. Hopefully not,
20 hopefully we can go back to New Jersey and stay there.
21 Thank you, your Honor.

22 THE COURT: Thank you very much.

23 MR. SHAPIRO: Judge, can I have 30 seconds on
24 behalf of the relater in the California case?

25 THE COURT: You gave me an ex parte motion which I

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Motion by Plaintiff, International Union of Operating Engineers, Local No. 68 Welfare Fund For Immediate Disposition On and Granting of Plaintiff's Motion for Remand Based Upon Defendants' Failure to File Supplemental Briefing was served on all counsel on the attached Service List by electronic service pursuant to Case Management Order No. 2. The counsel listed below are not registrants of Verilaw and are being served First Class mail.

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